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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 299 ➤

THE EARLY & DANIEL COMPANY, APPELLANTS,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED FEBRUARY 27, 1925

(30,905)



(30,905)

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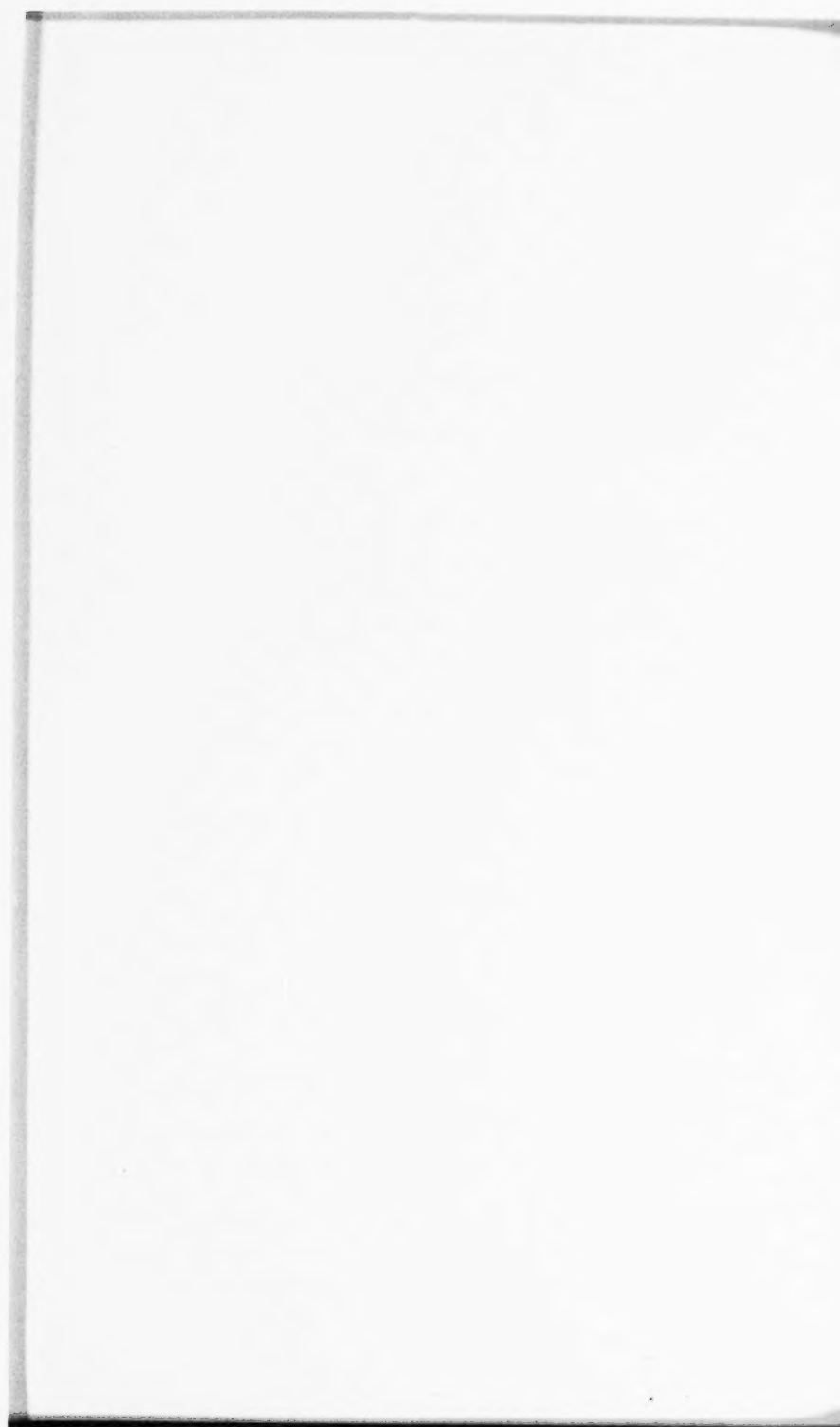
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1]

IN THE COURT OF CLAIMS

No. 238-A

THE EARLY & DANIEL COMPANY, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed August 2, 1921

To the Honorable the Court of Claims:

Plaintiff is a corporation duly incorporated under the laws of the State of Ohio, having its principal office and place of business at Cincinnati, Ohio.

On or about the 31st day of July, 1917, the plaintiff entered into a contract with S. C. Vestal, Lieutenant-Colonel, Quartermaster Corps, United States Army, acting for and on behalf of the defendant, whereby the plaintiff agreed to furnish and deliver and the defendant agreed to buy from the plaintiff during the period commencing August 1, 1917, and ending September 30, 1917, [fol. 2] such hay as might be required during July and the first half of August of 1917, not to exceed 6,000,000 pounds, at 97½ cents per hundred pounds, and such hay as might be required during the last half of August and all of September, 1917, not exceeding 6,000,000 pounds, at 95 cents per hundred pounds, to be delivered f. o. b. cars at Newport News, Virginia, subject to call of the defendant in lots of not to exceed 1,000,000 pounds per lot. The said defendant made calls under said contract at divers times during the period from July 31 to September 30, 1917, which calls plaintiff complied with; and thereafter, on the 25th day of September, 1917, after it became impossible, owing to causes beyond the control of plaintiff, for plaintiff to furnish the hay referred to in said call, and when the defendant well knew that it was impossible for plaintiff to furnish the hay referred to in said call, defendant made call upon the plaintiff to furnish 4,000,000 pounds of hay, to be delivered September 30, 1917. Thereafter plaintiff refused to furnish said hay, and notified the Camp Quartermaster in charge of the receipt of hay at Newport News that it would refuse to furnish said hay. Thereafter, on November 15, 1917, the said Camp Quartermaster notified the plaintiff that, unless the hay specified in said call dated September 25, 1917, was delivered, purchases would be made in the open market and charged to the account of plaintiff. Thereafter, on November 21, 1917, plaintiff agreed that it would furnish the hay mentioned in the said call, under protest, and would take up the matter of price to be paid therefore with the proper authorities at Washington.

Plaintiff did thereafter furnish said 4,000,000 pounds of hay. The reasonable value of said hay, as furnished, at the time same was [fol. 3] furnished, was \$30.00 per ton, being \$60,000.00 in all.

The amount paid plaintiff was \$19.00 per ton, making \$38,000.00. By reason thereof the plaintiff claims the difference between said amounts, being \$22,000.00.

The claim of plaintiff has been duly presented to the Camp Quartermaster at Newport News, Virginia; to the Acting Quartermaster General at Washington, D. C.; to the Auditor for the War Department; to the Secretary of War; to the Comptroller of the Treasury, and to the Board of Contract Adjustment, and has been denied by all of said officers and by said Board.

Plaintiff is the sole owner of said claim; no assignment or transfer of said claim, or any part thereof, has been made, and plaintiff is justly entitled to the amount herein claimed after allowing all just credits and offsets.

Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government or to any of its enemies.

Plaintiff believes that all the facts herein set out are true.

Francis B. James, Washington, D. C., Attorney of Record;
Harmon, Colston, Goldsmith & Hoadley, Cincinnati, O.;
Ewing H. Scott, Washington, D. C., of Counsel, Attorneys
for Plaintiff.

[fol. 4] Sworn to by H. Lee Early. Jurat omitted in printing.

[fol. 5] II. GENERAL TRAVERSE—Entered Oct. 3, 1921

No demurrer, plea, answer, counter-claim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. ARGUMENT AND SUBMISSION OF CASE

On October 22, 1924, this case was argued and submitted on merits by Mr. Ewing H. Scott, for the plaintiff, and by Mr. Edwin S. McCrary, for the defendant.

[fol. 6] IV. **Findings of Fact, Conclusion of Law and Opinion of the Court by Hay, J.**—Entered November 3, 1924

This case having been heard by the Court of Claims, the court, upon the evidence makes the following

FINDINGS OF FACT

I

Plaintiff is a corporation duly incorporated under the laws of the State of Ohio, and having its principal office and place of business at

Cincinnati, Ohio. On or about the 31st day of July, 1917, pursuant to sealed proposals previously submitted, it entered into a contract with S. C. Vestal, Lieutenant-Colonel, Quartermaster Corps, United States Army, acting for and on behalf of the defendant, whereby the plaintiff agreed to furnish and deliver, and defendant agreed to buy from the plaintiff during the period commencing August 1, 1917, and ending September 30, 1917, such hay as might be required during July and the first half of August, 1917, and not to exceed six million pounds, at 97½ cents per one hundred pounds, and such hay as might be required during the last half of August and all of September, 1917, not exceeding six million pounds, at 95 cents per hundred pounds, to be delivered f. o. b. cars at Newport News, Va., subject to call of the defendant in lots of not to exceed one million pounds per lot.

The said contract is as follows:

"Contract for Supplies

between S. C. Vestal, Lieut. Colonel, Quartermaster Corps, U. S. A., and the Early & Daniel Co., Cincinnati, Ohio, for forage "hay" required at Newport News, Virginia. Date of contract July 31, 1917. Contract expires September 30, 1917. Sureties, the Aetna Casualty & Surety Company, \$25,000,000. Appropriation and amount S. S. & T., Q. M. C., F. Y. 1918, \$115,500.

"These articles of agreement entered into this 31st day of July, nineteen hundred and seventeen, between S. C. Vestal, Lieut. Colonel, Quartermaster Corps, United States Army, on the first part, for and in behalf of the United States of America, and the Early & Daniel Company, Cincinnati, Ohio (a corporation existing under the laws [fol. 7] of the State of Ohio), of Cincinnati, in the county of Hamilton and State of Ohio (hereinafter designated as contractor), of the second part. Witness: That the said parties do hereby mutually covenant and agree to and with each other—referring to any advertisement, circular to bidders, and specifications hereto attached or referred to herein, or pertaining hereto, and to samples referred to herein or in said advertisement, circular to bidders, or specifications, which, so far as they are applicable, form a part of this contract—as follows:

1. That the said contractor shall furnish and deliver during the period commencing August 1, 1917, and ending September 30, 1917, the following supplies for or at the military stations, in the manner and at the prices stated in this contract; deliveries to be made in such quantities, at such times, and in such bins, sheds, bunkers, or other places of storage at the military stations named, as may be required by the receiving officer or agent of the Quartermaster Corps, unless the minimum quantities to be delivered are stated, or different conditions as to place and time of delivery are expressly set forth in this contract, viz:

Twelve million (12,000,000) pounds of hay, No. 1 timothy, at the following prices:

6,000,000 lbs. @ \$0.97½ per cwt.

6,000,000 lbs. @ \$0.95 " "

F. o. b. cars Newport News, Va.

according to instructions to bidders and specifications for forage dated July 10th, 1917, attached hereto, which are hereby made a part hereof as fully as if written herein; subject to call of the party of the first part in lots of not to exceed one million pounds (1,000,000 lbs.) per lot, all to be delivered within three months from date of first call."

II

Pursuant to the terms of the contract a call for five hundred thousand pounds of hay was made by the Government under date of August 15, 1917, this being the first call under the contract.

The delivery of the hay required under the first call was made immediately upon receipt of the call.

Following the first call subsequent calls were made as follows:

Call No. 2 for 1,050,000 pounds, dated August 20, 1917;

Call No. 3 for 2,000,000 pounds, dated September 5, 1917;

Call No. 4 for 4,450,000 pounds, dated September 12, 1917; and

Call No. 5 for 4,000,000 pounds, dated September 25, 1917.

IV

Hay of an acceptable grade and in quantities sufficient to supply the needs of Newport News was not grown in the vicinity of Newport News, and it was necessary for plaintiff to look elsewhere for hay to fill the contract requirements.

The hay purchased and shipped to fill the contract was obtained mostly in Ohio.

During the contract period transportation conditions were very abnormal and plaintiff experienced numerous difficulties in securing deliveries at Newport News.

[fol. 8] Of 108 cars shipped by plaintiff to Newport News the average period in transit was 25½ days, the running time on the individual cars ranging from 5 to 10 days. Every effort was made by plaintiff to secure prompt movement of cars. To this end plaintiff, during the contract period, continuously sought the assistance of the officers in charge of the embarkation depot at Newport News, and other Government officials.

V

The plaintiff delivered all the hay requested by defendant on calls numbered 2, 3, and 4 without making any protests that the calls were for amounts of hay greater than 1,000,000 pounds. The plaintiff did not at any time make any objection to the calls made upon it until the fifth call was made, and then for the first time the plaintiff objected that the call was for more pounds of hay than the contract allowed for any one call, and that objection was not made until it was too late for the defendant to amend the call. The plaintiff, after the fifth call was made, made arrangements to complete its

delivery of hay under the second, third, and fourth calls although each of these calls required the delivery of more than 1,000,000 pounds of hay.

VI

On September 25, 1917, defendant made its fifth call on said contract for 4,000,000 pounds of hay and advised plaintiff of said call by telegram and by letter. Whereupon plaintiff's vice president, Mr. Terrell, immediately wrote Colonel Knight that the call was not deemed by plaintiff to be in accordance with the contract, and that plaintiff did not intend to fill it. The fifth call, dated September 25, 1917, asked for the delivery of 4,000,000 pounds of hay by September 30, 1917. It would have been impossible to deliver all of said hay by that time, but under terms of the contract plaintiff had until November 15, 1917, being three months from the date of the first call, August 15, 1917, to complete its deliveries of hay on this contract. This could have been done as plaintiff's deliveries of hay on this contract averaged $25\frac{1}{2}$ days from date of call, and plaintiff had 51 days within which to complete deliveries of hay upon the fifth call.

VII

Plaintiff's vice president, Mr. Terrell, visited Newport News on October 4, 1917, for the purpose of investigating the situation with respect to a claimed shortage of hay, and after making arrangements for delivery to the camp of the amount of hay necessary to make up the full 8,000,000 pounds of hay called for under the first four calls, advised Colonel Knight that plaintiff did not intend to fill the fifth call for 4,000,000 pounds.

VIII

Nothing further was said about filling the fifth call until November 9, 1917, when plaintiff received the following telegram from Colonel Knight:

[fol. 9] "Records here show that there are over 5,000,000 pounds of hay still due on your contract of August third last. Only two car-loads have been received since November first. Request immediate wire advice as to your intentions as to completing of this contract."

Immediately upon receipt of the above telegram plaintiff's vice president wired the camp quartermaster that he would arrive at Newport News the following Sunday night and call on him early Monday morning. Mr. Terrell went to Newport News as indicated and after conferring with Colonel Knight asked him to give plaintiff time to put the matter up to Washington for a decision, which he agreed to do. However, on November 15, the camp quartermaster again wired plaintiff that unless the hay specified in the fifth call was delivered, purchases would be made in the open market and charged to plaintiff's account.

In reply plaintiff immediately wired the camp quartermaster reiterating its intention to refer the matter to Washington, and again on November 19 the camp quartermaster wired to plaintiff as follows:

"Amount hay on hand will supply needs to December fourth. Require prompt delivery of four million pounds. Advise at once your action, otherwise must buy in open market."

After further exchange of telegrams plaintiff agreed on November 21, 1917, to fill the fifth call under protest and take the matter up with the proper authorities at Washington. The telegram from plaintiff to the camp quartermaster of November 21, 1917, reads as follows:

"We will start shipping hay immediately, and in case you need any before arrival will arrange to have Hiden loan us a supply. Want it distinctly understood that we are doing this under protest and are going to put the matter up to proper authorities in Washington; and if they rule in our favor, want settlement at fair market price for amount we overfill. Will you wire C. S. Ruttle, General Agent, D. B. C. & W. Railway, to furnish equipment immediately as we request for hay to ship to you? Answer."

IX

During the month of November, 1917, the railroad yards at Newport News were badly congested, and an embargo had been placed against further shipments to that point. There were several hundred cars of hay on the tracks. Owing to the congested conditions and the inability to make deliveries at Newport News, plaintiff made an arrangement with Mr. P. W. Hiden to deliver the 4,000,000 pounds of hay that plaintiff had agreed to furnish under protest.

X

At the time of the receipt by plaintiff of the camp quartermaster's telegram of November 19, 1917, advising that hay would be purchased in the open market and charged to plaintiff's account unless plaintiff agreed to promptly deliver 4,000,000 pounds of hay the Government owed plaintiff a considerable sum of money for hay delivered under the contract, and had not yet made settlement thereon.

[fol. 10]

XI

Plaintiff delivered under protest the 4,000,000 pounds of hay demanded by the camp quartermaster, and settlement has been made thereof at the contract price. The contract price was \$19 per ton, and the amount paid plaintiff for the 4,000,000 pounds of hay delivered was \$38,000, which amount was accepted without protest.

At the time of delivery the market price of hay was \$30 per ton. The market value of the 4,000,000 pounds of hay delivered was \$60,000.

XII

After the plaintiff had accepted without protest the sum of \$38,000, which the Government paid to it under the contract the plaintiff filed its claim for \$22,000 with the Acting Quartermaster General of the United States Army, with the Auditor for the War Department, with the Secretary of War, with the Comptroller of the Treasury, and with the Board of Contract Adjustment, all of whom in turn decided that the claim could not be paid.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover and that its petition be and the same is hereby dismissed. Judgment is awarded against the plaintiff in favor of the defendant for the cost of printing the record in this case, the amount thereof to be entered by the clerk and to be by him collected according to law.

OPINION

HAY, Judge, delivered the opinion of the court.

This is a suit brought by the plaintiff against the United States to recover the sum of \$22,000.

The material facts are that on the 31st day of July, 1917, the plaintiff entered into a written contract with the United States whereby it agreed to furnish and deliver 12,000,000 pounds of hay to the United States, f. o. b. cars Newport News, Va., at the following prices, 6,000,000 pounds @ \$0.97½ per cwt. and 6,000,000 pounds @ \$0.95 per cwt. The delivery of said hay was subject to call of the United States in lots of not to exceed one million pounds per lot, all to be delivered within three months from date of the first call. The first call was made on August 15, 1917, and was for 500,000 pounds of hay, which was delivered. The second call was made on August 20, 1917, and was for 1,050,000 pounds of hay, the third call was made on September 5, 1917, and was for 2,000,000 pounds of hay, the fourth call was made on September 12, 1917, and was for 4,450,000 pounds of hay, all of which hay was delivered. Thus the second, third, and fourth calls were made for more than the 1,000,000 pounds of hay, which the contract provided should be the quantity to be called for at any one time. These three calls were all received by the plaintiff, and the hay was delivered by it without objection or protest as to the quantity called for.

[fol. 11] The fifth call was made on September 25, 1917, for 4,000,000 pounds of hay, and on October 4, 1917, four days after the contract expired the plaintiff refused to deliver the hay upon the ground that the contract provided that only 1,000,000 pounds of hay could be called for at any one time.

The plaintiff under the provisions of the contract had ample time in which to make delivery of the hay as it had three months to

complete such delivery from the date of the first call, which was on August 15, 1917.

The plaintiff having refused to deliver the hay, the Government after some correspondence informed the plaintiff that if the hay was not delivered under the contract it would buy hay in the open market for plaintiff's account. Thereupon the plaintiff delivered the hay under the contract in the latter part of November and the first of December 1917, but protested against the delivery at contract prices, and notified the defendant that it would take the matter up with the authorities at Washington, and if they should rule in its favor that it wanted a settlement at fair market price. This the plaintiff did, but the authorities in Washington ruled against it. Whereupon the plaintiff accepted the market price for the 4,000,000 pounds of hay without protest at the time of its acceptance of the contract price, and has now brought this suit for the amount which it claims is the difference between the contract price and the market value of the hay.

The plaintiff would have been within its rights under the contract if it had adhered to its refusal to deliver the 4,000,000 pounds of hay, but it did not do so. It went ahead and voluntarily delivered the hay under the terms of its contract and thereby waived the provisions of the contract upon which it could have relied. It does not appear that there was any duress or compulsion exercised by the defendant against the plaintiff.

The last call was made specifically with reference to the contract. The delivery was made under the provisions of the contract, and the protest made by the plaintiff was not regarded by the defendant. The situation was that the plaintiff had the option of delivering the hay under the terms of the contract or of not delivering it at all. It chose to deliver under the terms of the contract. The matter of price was not left open by the defendant; on the contrary, it tendered the contract price, which was accepted by the plaintiff. It must be held that the plaintiff voluntarily accepted the call for 4,000,000 pounds of hay, and that it delivered the hay at the contract price. *Willard, Sutherland & Company, v. United States*, 262 U. S. 489. *William C. Atwater & Co. Inc. v. United States*, 262 U. S. 495. *Charles Nelson Company v. United States* 261 U. S. 17.

The petition of the plaintiff must be dismissed. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 12]

V. JUDGMENT

At a Court of Claims held in the City of Washington on the 3rd day of November, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff as

aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and against the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One hundred and forty-one dollars and seventy cents (\$141.70) the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VI. SUBSTITUTION OF ATTORNEY

On suggestion of the death of Francis B. James, attorney of record, and on motion made therefor, Ewing H. Scott was substituted as attorney of record, by the court, on February 2, 1925.

[fol. 13] VII. PETITION FOR APPEAL—Filed January 26, 1925

Now comes the plaintiff, The Early and Daniel Company, by Ewing H. Scott, its attorney, make application to the Honorable Court of Claims for an appeal from the court's decision in the above-entitled case, decided November 3, 1924, to the Supreme Court of the United States.

Respectfully submitted, Ewing H. Scott, Attorney for Plaintiff.

VIII. ORDER ALLOWING APPEAL

It is ordered by the court this 2d day of February, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 14] IX. COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the substitution of attorney; of the plaintiff's application for appeal; of the order of the court allowing plaintiff's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of February, 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,905. Court of Claims. Term No. 299. The Early & Daniel Company, appellants, vs. The United States. Filed February 27th, 1925. File No. 30,905.

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Office Supreme Court

F I L E D

APR 8 1926

WM. R. STANB
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IN THE
Supreme Court of the United States

October Term, 1925.

—
No. 299.
—

THE EARLY & DANIEL COMPANY, *Appellant*,
vs.
THE UNITED STATES.

—
Appeal from the Court of Claims.
—

BRIEF ON BEHALF OF APPELLANT.
—

BENTON S. OPPENHEIMER,
EWING H. SCOTT,
Attorneys for The Early & Daniel Company.

April 8, 1926.

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IN THE
Supreme Court of the United States

October Term, 1925.

No. 299.

THE EARLY & DANIEL COMPANY, *Appellant*,
vs.
THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This is an action on an implied contract for the recovery of \$22,000, said sum being the balance due on 4,000,000 pounds of hay delivered by The Early & Daniel Company to the Government during the months of November and December, 1917. (R. 7).

Under date of July 31, 1917, appellant entered into

a contract with S. C. Vestal, Lieutenant-Colonel, Quartermaster Corps, United States Army, acting for and on behalf of the defendant, whereby the appellant agreed to furnish and deliver and the defendant agreed to buy from the plaintiff during the period commencing August 1, 1917, and ending September 30, 1917, such hay as might be required during July and the first half of August of 1917, not to exceed 6,000,000 pounds at 97½ cents per hundred pounds, and such hay as might be required during the last half of August and all of September, 1917, not exceeding 6,000,000 pounds, at 95 cents per hundred pounds, to be delivered f.o.b. cars at Newport News, Virginia, subject to call of the defendant in lots of not to exceed 1,000,000 pounds per lot. (R. 3.)

Calls were made under the contract as follows:

Call No. 1 for 500,000 pounds, dated August 15, 1917;

Call No. 2 for 1,050,000 pounds, dated August 20, 1917;

Call No. 3 for 2,000,000 pounds, dated September 5, 1917;

Call No. 4 for 4,450,000 pounds, dated September 12, 1917; and

Call No. 5 for 4,000,000 pounds, dated September 25, 1917. (R. 4.)

Appellants complied with the first four calls under the contract, but refused to fill the fifth call of September 25, 1917, on the ground that (1) owing to causes beyond the control of plaintiff, which causes were well-known to defendant, it was impossible to comply with such call within the contract period, and (2) the call was irregular and improper, being for an amount in excess of 1,000,000 pounds. (R. 5.)

During the contract period transportation conditions were very abnormal and plaintiff experienced numerous difficulties in securing deliveries at Newport News, the average period required to fill an order being 25½ days. Every effort was made by plaintiff to secure prompt movement of cars. (R. 4.)

Nothing further was said about filling the fifth call until November 9, 1917, when plaintiff received a telegram from Colonel Knight inquiring about plaintiff's intentions of completing the contract. Plaintiff's Vice-President immediately went to Newport News and asked that plaintiff be given time to put the matter up to Washington for a decision, which Colonel Knight agreed to do. However, on November 15th the Camp Quartermaster again wired plaintiff that unless the hay specified in the fifth call was delivered, purchases would be made in the open market and charged to plaintiff's account. After an exchange of telegrams, plaintiff agreed on November 21, 1917, to fill the fifth call under protest and take the matter up with the proper authorities at Washington. (R. 5-6.)

Plaintiff delivered under protest the 4,000,000 pounds of hay demanded by the Camp Quartermaster. The contract price was \$19 per ton, while at the time of delivery the market price of hay was \$30 per ton. The amount paid plaintiff for the 4,000,000 pounds of hay delivered was \$38,000, while the market value thereof was \$60,000, and plaintiff therefore claims the difference of \$22,000. (R. 6.)

ARGUMENT.

I.

THE TERMINAL DATE OF THE CONTRACT.

The contract of July 31, 1917, entered into between the Government and claimant covered requirements for the "last half of August and September," and required claimant to "*furnish and deliver* during the period commencing August 1, 1917, and ending September 30, 1917," the supplies under the contract. The contract contained the further provision that all the goods were "to be delivered within three months from date of first call." (R. 3-4.)

In its decision the Court of Claims found that the plaintiff "had until November 15, 1917, being three months from the date of the first call, August 15, 1917, to complete its deliveries on this contract." (R. 5). It is respectfully submitted that the contract terminated on September 30, 1917, and that the provision requiring delivery of all goods under the contract within three months from the date of the first call was in direct conflict with the true intent of the contract and therefore that such provision cannot be considered in reaching a conclusion as to the terminal date of the contract.

In the case of *A. Leschen & Sons Rope Co. vs. Mayflower Gold Mining & Reduction Co.*, 173 Fed. 855, the Court stated:

"The intention of the parties, when manifest, or when ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or the dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

The rule was further considered in *O'Brien vs. Miller*, 168 U. S. 287, in which case the Court said:

"The elementary canon of interpretation, is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

Canal Co. vs. Hill, 15 Wall. 94;
United States vs. Stage Co., 199 U. S. 414.

Under the construction given the language of the contract by the Court of Claims, had the Government failed to make any calls under the contract until just prior to September 30, 1917, the contract would not have expired until the latter part of December, 1917. This was clearly not the intention of the parties as expressed in the contract. The contract required the claimant to furnish and deliver during August and September hay to meet the requirements of said two months. It is difficult to see how hay delivered in November or December, 1917, could be held to cover the requirements for August and September, 1917.

It seems to be a well-settled rule of law that where two provisions in a contract, one specific and the other general, are in conflict, the specific provision must take precedence. It is therefore submitted that the Court of Claims has erred in holding that the period of the contract was extended until November 15, 1917, by the provision in question, which provision is so obviously inconsistent with the true intent of the parties under the contract.

II.

THE CALL OF SEPTEMBER 25, 1917, WAS NOT
WITHIN THE CONTRACT.(a) *Irregularity of Call.*

Under the provisions of the contract, hay was to be delivered under calls to be made by the Government in lots of not to exceed 1,000,000 pounds per lot. It was contended by Counsel for the Government that inasmuch as the last three calls under the contract were for lots in excess of 1,000,000 pounds, and as claimant had made no objection on such ground to calls Nos. 3 and 4, but had furnished hay under such calls, it was estopped from objecting to the irregularity of the fifth call, which was for 4,000,000 pounds. It is true that claimant, by the delivery of the hay required by calls Nos. 3 and 4, did acquiesce in the irregularity of such calls, but such acquiescence cannot under any rule of law be construed as a waiver of its right to make objection to the last call. The Court of Claims upheld claimant on this point, stating that "the plaintiff would have been within its rights under the contract if it had adhered to its refusal to deliver the 4,000,000 pounds of hay." (Tr. 8.)

(b) *Impossibility of Delivery Within Contract Period.*

As heretofore stated, the contract required that claimant should "furnish and deliver during the period commencing August 1, 1917, and ending September 30, 1917," the hay covered by the contract.

The hay could not be delivered except upon call. Hence it is clear that calls had to be issued at such times as to make possible the delivery within the con-

tract period. It was not sufficient that calls should be issued prior to the terminal date, for, as has been stated, the contract required delivery at the cantonment at that time. As shown by the evidence in the case, and as found by the Court of Claims, the average time required to fill a call was $25\frac{1}{2}$ days, and the Court further stated that "it would have been impossible to deliver all of said hay by that time" (September 30, 1917) (R. 5). This fact was well-known to the Camp authorities, who were fully conversant with the abnormal transportation conditions then prevailing and with the difficulties encountered by claimant in complying with calls.

The last call having been irregular and improper, and having been issued at such time as to make delivery within the contract period impossible, there was no obligation upon the part of claimant to honor it. Otherwise claimant would have been required to make deliveries over a period far beyond the terminal date of the contract, and for the requirements of the Camp subsequent to the contract period. During the period of the operation of the contract and at the time of its expiration, the Government had received all the benefits thereunder to which it was rightfully entitled. It was clearly improper for the Camp Quartermaster to insist upon the claimant making deliveries subsequent to the expiration of the contract to cover requirements of the Camp which were clearly not those covered by the contract.

III.

COMPLIANCE WITH THE FIFTH CALL WAS NOT VOLUNTARY BUT WAS MADE UNDER DURESS, AND AN IMPLIED CONTRACT AROSE TO PAY FOR THE GOODS FURNISHED.

The Court of Claims found on this point as follows (Tr. 8):

“It must be held that the plaintiff voluntarily accepted the call for 4,000,000 pounds of hay, and that it delivered the hay at the contract price. Willard, Sutherland & Company v. United States, 262 U. S. 489. William C. Atwater & Co., Inc., v. United States, 262 U. S. 495. Charles Nelson Company v. United States, 261 U. S. 17.”

A careful reading of the cases cited by the Court of Claims in support of its finding on this point will, we believe, clearly show that the issues involved in those cases are entirely different from those in the present case and therefore cannot be held to be controlling here.

The *Charles Nelson Company* case requires but brief mention. That case involved a contract for a certain amount of lumber, and contained a provision requiring the contractor to deliver any quantity of a particular kind of lumber which the Government might order, the Government not being obligated to order any specific quantity. The Court held that the lumber was furnished by the contractor under such provision *during the contract period and without protest*, so that case can have no application here.

The enforceability of a provision in a contract allowing the United States to increase or decrease the

amount called for by the contract was the chief issue in the case of *Willard, Sutherland & Company vs. United States, supra*. The Government advised the contractor long before the contract expired that it should furnish an additional ten per cent of the total contract requirement, which additional amount was furnished *within the contract period*. The contractor advised the Government that "This excess would be furnished under protest, reserving the right to take the proper steps to recover the difference between the current market price and the contract price; it asked confirmation from the Department and stated that on receipt thereof, it would furnish the coal." The Government did not confirm such proposition but directed the contractor to supply the coal ordered, and the Court stated in its opinion that "appellant failed further to object and delivered the coal." It would seem from this language of the Court that it considered that the contractor had waived its earlier protest and voluntarily supplied the coal ordered.

The case of *Atwater & Company vs. United States, supra*, presented facts similar to those in the *Willard Sutherland* case, and was held to be controlled by the opinion in that case.

But, whatever the Court had in mind regarding the protest in the *Atwater* and *Willard Sutherland* cases, the facts and issues presented in this proceeding are entirely different. In this case, the fifth call for 4,000,000 pounds of hay issued on September 25, 1917, being irregular and improper on its face, and further, the call being issued at such a time as to make delivery within the terms of the contract impossible, hay delivered under such call was not a delivery *under the contract*. Furthermore, such hay was not delivered *within the contract period* but was delivered long after

the contract had expired and to satisfy requirements of an entirely different period.

There can be no serious denial of the fact that claimant had no other alternative than to deliver the materials demanded and leave the matter of just compensation to be later determined by the proper authorities. From the practical standpoint, the demands of the Camp Quartermaster were the same as if the property in question had been commandeered by the Government. If claimant had refused to meet the demands of the Camp Quartermaster, it would have been confronted with the following situation:

First, the Camp Quartermaster had threatened to purchase hay in the open market and charge claimant with the difference;

Second, claimant knew from experience that if it should refuse to deliver the materials as demanded, it would be reported as defaulting on its contract and would thereafter be "black-listed" by the Government;

Third, claimant had submitted bids on other contracts with the Government, and if it was reported as defaulting on this contract such bids would not be considered by the Government; and

Fourth, claimant's organization consisted of men who did not desire at the expense of dollars and cents to assume the odium of being charged with unwillingness to aid the Government in the time of its war distress.

On this subject, the following passage from 13 C. J. 549 is pertinent:

"One who goes beyond the requirements of his contract under circumstances of doubt should not from that fact alone have his act given the effect of a concession * * *. Acts of the parties

which are specifically performed without prejudice to either party's interpretation of the contract, leaving the same open for future determination, cannot be considered as being on the practical construction of the contract."

The above language is in part quoted from the opinion of the Supreme Court of Vermont in the case of *McLean vs. Windham Light Company*, 85 Vermont 167, 81 Atl. 613.

The case of *Manistee Navigation Co. vs. Louis Sands Salt Co.* 174 Mich. 1, 140 N.W. 545, is also illuminative. The Court says:

"The arrangement to advance the \$15,000.00, expressly made without prejudice to either party's interpretation of the contract, but leaving the same open for future determination, not only did away with any notion of a practical construction, but also disposed of the question of estoppel raised by defendant."

The recent case of *St. Louis, B. & M. Ry. Co. vs. United States* 268 U. S. 169, involved the question whether the acceptance from the Government of a smaller amount than is due would effect the discharge of the obligation. The Court held that acquiescence by the claimant in such smaller amount would ordinarily effect a discharge, but stated:

"But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver or from which an estoppel might arise. Every case in which this court has sustained the affirmative

defense of acquiescence rests upon findings which include at least one of these additional features."

We submit that the present case is controlled by the decision in *Freund vs. United States*, 260 U. S. 60. There the plaintiff had a mail contract with the United States, and the United States sought to require the contractor to perform service over a different route than that covered by the contract, and involving a greater service than the route specified in the contract. The contractor protested against performing the additional and wholly different service, but, being threatened with suit on its bond, performed the service and accepted periodical payments. The Court of Claims held that the contractor had acquiesced in the additional service, but the Supreme Court held that it had not, and stated:

"We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on."

The Court in that case cited *United States vs. Utah, Nevada & California Stage Co.*, 199 U. S. 414, and *Hunt vs. United States*, 257 U. S. 125, which cases involved facts substantially similar to those of the *Freund* case.

We quote from the language of the Court in the case of *Maxwell vs. Griswold, et al.*, 10 How. 242:

"But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order

to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant in this class of cases that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils. He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however, well meant may have been the views of the collector. The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

The Court in *Robertson vs. Frank Brothers Co.*, 132 U. S. 17, followed the decision in *Maxwell vs. Griswold, et al.*, *supra*, and said:

"The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence

the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary."

The action of the Government in the present case, as in the *Freund* and other cases cited, bears every evidence of compulsion.

The ability of the Government at all times, especially in times of war, to bear heavily upon its citizens with whom it contracts, is self-evident from the very nature of things. Whether there has ever been any general tendency among some of the officers of certain departments of the Government to exert improper and unlawful pressure upon Government contractors need not be discussed here, but it is clear that the case at bar presents a situation in which the Government contracting officer took advantage of the excitement and great public feeling then prevailing to coerce compliance with the Government's demands.

The claimant's protest against making the deliveries demanded was well taken. To have declined to make the deliveries would have been next to impossible under the then existing conditions. Claimant's proposal to make deliveries demanded and later seek an adjudication of its rights before the proper authorities was fair to both parties as it resulted in immediate delivery of material to the Government and left all differences to be adjusted at a convenient time. It certainly should be the desire and the policy of the Government to encourage every effort to bring about an amicable adjustment of matters with contractors, and not force litigation, which must ever be expensive, disagreeable and demoralizing.

To hold otherwise than that claimant was protected

by its protest would be tantamount to holding that in any dispute between the Government and the contractor the contractor must at his peril refuse to yield to the Government's demands, for otherwise he has no legal means of redress. That this cannot be the law seems manifest. Not only would such a rule not be to the advantage of the Government, but it would be distinctly detrimental to the contractor and contrary to the public interest.

The hay was delivered to the Government under an implied promise to pay for the same at the market value at the time of its delivery. Deliveries were actually made long after the period during which the contract was operative had elapsed. No other express contract had been entered into between the Government and claimant for delivery of hay at Newport News. The parties were simply in this situation: there was no longer any contract between them. The Camp Quartermaster demanded that the contractor furnish hay at a price which had been fixed in a previously existing contract. The contractor denied that any such contract was still in existence or that it was obligated to furnish hay at any such price; but it did agree to furnish the amount of hay demanded and to present its claim for the market price of the hay.

CONCLUSION.

It is respectfully submitted that it has been conclusively shown that the last call, being irregular and improper on its face, and being issued at such time as to make delivery within the contract terms impossible, was not a proper call under the contract; that the last call, therefore, was void and of no effect, and

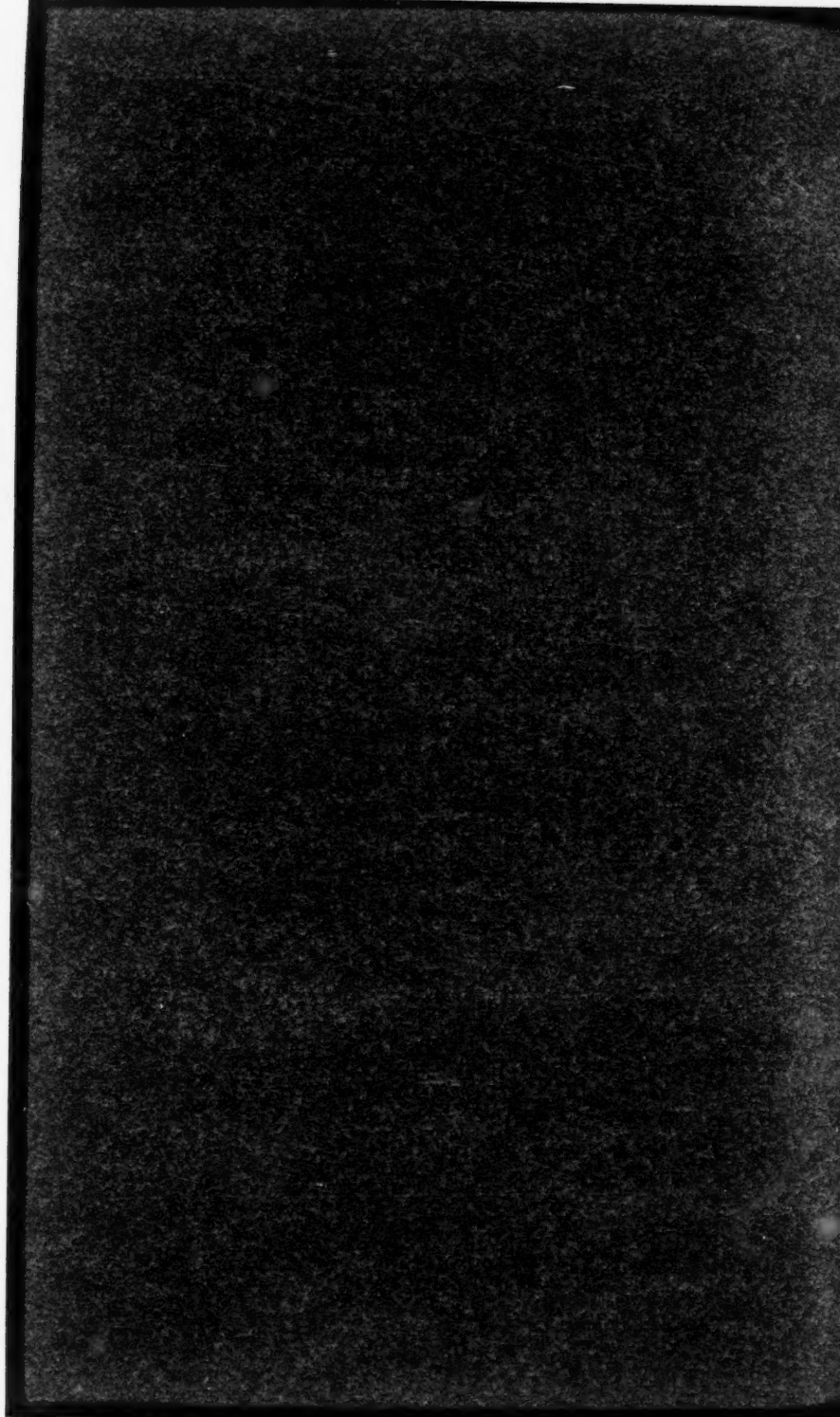
claimant was under no obligation to make any delivery thereunder; that the contract was on September 30, 1917, completely executed as far as was possible, and remained of no further force or effect; that subsequent orders to the contractor by the Government for the delivery of any commodities whatsoever were given either under a new express contract or an implied contract; that there being admittedly no new express contract that an implied contract arose to pay the contractor for such hay at the prevailing market price; that the deliveries were made under such circumstances as to amount to complusion, in other words "moral duress, not justified by law," and that the right to demand and receive the prevailing market price therefor has not been waived or forfeited by the claimant, and that it is therefore entitled to payment in accordance with the claim as presented.

Respectfully submitted,

BENTON S. OPPENHEIMER,
EWING H. SCOTT,

Attorneys for The Early & Daniel Company.

April 8, 1926.



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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 299

THE EARLY & DANIEL COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Findings of Fact and Opinion by the Court of Claims (R. 2-8) are reported in 59 Ct. Cls. 932.

JURISDICTION

The judgment of the Court of Claims was rendered on November 3, 1924. (R. 8.) Application for appeal was filed January 26, 1925, and allowed on February 2, 1925. (R. 9.) The jurisdiction of this Court is based on Section 242 of the Judicial Code as it stood prior to the Act of February 13, 1925.

STATEMENT

The appellant, an Ohio corporation (R. 2), on July 31, 1917, entered into a contract with the Quartermaster Corps of the Army, whereby appellant agreed to furnish and deliver not to exceed 12,000,000 lbs. of hay 6,000,000 lbs. to be at the price of 97½¢

per cwt. and 6,000,000 lbs. to be at the price of 95¢ per cwt. The contract provided (R. 3, 4) that the appellant—

shall furnish and deliver during the period commencing August 1, 1917, and ending September 30, 1917, the following supplies for or at the military stations, in the manner and at the prices stated in this contract; deliveries to be made in such quantities, at such times, and in such bins, sheds, bunkers, or other places of storage at the military stations named as may be required by the receiving officer or agent of the Quartermaster Corps, unless the minimum quantities to be delivered are stated or different conditions as to place and time of delivery are expressly set forth in this contract, viz:

Twelve million (12,000,000) pounds of hay, * * *; subject to call of the party of the first part [the Government] in lots of not to exceed one million pounds (1,000,000 lbs.) per lot, all to be delivered within three months from date of first call.

The Government made the following calls (R. 4):

Call No. 1, for 500,000 lbs., dated August 15, 1917.

Call No. 2, for 1,050,000 lbs., dated August 20, 1917.

Call No. 3, for 2,000,000 lbs., dated Sept. 5, 1917.

Call No. 4, for 4,450,000 lbs., dated Sept. 12, 1917.

Call No. 5, for 4,000,000 lbs., dated Sept. 25, 1917.

The findings do not show what dates for delivery were designated in the calls. The hay covered by the first call was delivered immediately. (R. 4.) The hay covered by the second, third, and fourth calls was delivered after Sept. 25th. (R. 4, 5.)

The hay was sold f. o. b. Newport News, Va., but hay of suitable quality was not grown in the vicinity of Newport News, and most of that obtained for the contract was shipped from Ohio. Transportation facilities were disturbed during this period, and the time required therefor was unusually long. (R. 4.) Appellant delivered all the hay requested on calls 1, 2, 3, and 4 without any protest. Three of these calls each asked for delivery of more than 1,000,000 lbs. The appellant objected to call No. 5, because it exceeded 1,000,000 lbs., but such objection was not made until after too late to amend the call.

When call No. 5 for 4,000,000 lbs. was made on September 25, 1917, appellant advised the Government by letter that such call was not in accordance with the contract, and that appellant did not intend to fill it. This call, dated September 25, 1917, asked for the delivery of 4,000,000 lbs. of hay by September 30, 1917. It would have been impossible to deliver all of said hay by that time, but under the terms of the contract appellant had until November 15, 1917, three months from the date of the first call on August 15, 1917, to complete its deliveries of hay on this contract. Appellant's deliveries averaged $25\frac{1}{2}$ days from the date of call,

pay market value, we have an express contract, subject only to an appeal which failed, to take and pay the price fixed in the original contract.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

APRIL, 1926.



IN THE
Supreme Court
OF THE
United States

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20

IN RE THE PETITION OF WIL-
LIAM G. EHRLICH FOR A
WRIT OF HABEAS CORPUS

TRANSCRIPT OF RECORD.

HENRY J. SULLIVAN,
WM. C. PRENTISS,
JOSEPH E. MORRISON,
Attorneys for Petitioner.

Filed this _____ day _____, 1926.

Clerk, Supreme Court.

IN THE
Supreme Court
OF THE
United States

IN RE THE PETITION OF WIL-
LIAM G. EHRLICH FOR A
WRIT OF HABEAS CORPUS

TRANSCRIPT OF RECORD.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the

Court aforesaid, on their oath present, that one William G. Ehrlich, whose true and full name is to the Grand Jurors unknown, on or about the 19th day of December, A. D. 1925, in the County of Maricopa, State and District of Arizona, did wilfully, unlawfully, knowingly, and feloniously sell, dispense and distribute to one James Tabor a certain salt, compound, derivative and preparation of opium, to-wit: approximately forty grains of morphine, without first having registered with the Collector of Internal Revenue for the District of Arizona, his name and place of business, and place or places where such business was to be carried on, and without first having paid the special tax, as provided for by an Act of Congress entitled, "An Act to provide for the registration of, with Collectors of Internal Revenue and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives or preparations and for other purposes", approved December 17, 1914, as amended by an Act of Congress entitled, "An Act to provide Revenue, and for other purposes", approved February 24, 1919, as re-enacted by an Act of Congress known as "The Revenue Act of 1921"; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that one William G. Ehrlich, whose true and full name is to the Grand Jurors unknown, on or about the 14th day of January,

A. D. 1926, and within the County of Maricopa, State and District of Arizona, wilfully, unlawfully, knowingly and feloniously did have in his possession and under his control a certain salt, derivative, compound and preparation of opium to-wit: approximately forty-five grains of morphine, without first having registered with the Collector of Internal Revenue for the District of Arizona his name and place of business, and place or places where such business was to be carried on, and without first having paid the special tax, as provided for by an Act of Congress entitled, "An Act to provide for the Registration of, with Collectors of Internal Revenue and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives or preparations and for other purposes", approved December 17, 1914, as amended by an Act of Congress entitled, "An Act to provide Revenue, and for other purposes", approved February 24, 1919, as re-enacted by an Act of Congress known as "The Revenue Act of 1921", and at the same time and place of so possessing and controlling the said morphine as aforesaid, the said William C. Ehrlich was then and there a person dealing in, selling, distributing and dispensing opium, and the salts, derivatives, compounds and preparations thereof, as mentioned and defined by the said Acts of Congress; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

GEO. T. WILSON,
Asst. United States Attorney
for the District of Arizona.

(ENDORSEMENTS)

No. 2619—Phoenix

UNITED STATES DIST. COURT,
DISTRICT OF ARIZ.

.....DIVISION.

THE UNITED STATES OF AMERICA

vs.

WILLIAM G. EHRLICH,

INDICTMENT

WITNESSES:

S. D. Ramseur
Roy Wayland
F. W. Fogwell
A. G. Baldwin

A true bill,

Ewd. Allemand
Foreman

Filed in open Court this 1st day of February, A. D.
1926.

C. R. McFALL, Clerk.
By PAUL DICKASON,
Deputy Clerk.

Bail, \$

REGULAR OCTOBER, 1925, TERM AT PHOENIX
IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE DISTRICT OF ARIZONA.

(MINUTE ENTRY OF FEBRUARY 1, 1926.)

HONORABLE F. C. JACOBS,
UNITED STATES DISTRICT JUDGE,
PRESIDING.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM G. EHRLICH,
Defendant.

2619-C Phoenix

ARRAIGNMENT AND PLEA

The defendant, William G. Ehrlich, is present in person and with counsel, Henry J. Sullivan, Esq., and is now duly arraigned. The defendant waives reading of the Indictment and a copy thereof is handed to him; the defendant's plea is Not Guilty, which plea is duly entered.

REGULAR OCTOBER, 1925, TERM AT PHOENIX

(MINUTE ENTRY OF MARCH 2, 1926)

HONORABLE F. C. JACOBS,
UNITED STATES DISTRICT JUDGE,
PRESIDING.

COURT AND CAUSE

IT IS ORDERED by the Court that the following cases be set for trial at ten o'clock A. M. Tuesday, March 9, 1926.

C-2619 U. S. A. vs. William G. Ehrlich

REGULAR OCTOBER, 1925, TERM AT PHOENIX

(MINUTE ENTRY OF MARCH 10, 1926)

HONORABLE F. C. JACOBS,
UNITED STATES DISTRICT JUDGE,
PRESIDING.

COURT AND CAUSE

The defendant, William G. Ehrlich, is present in person and with counsel, Henry J. Sullivan, Esq., and withdraws his plea of Not Guilty heretofore entered, and pleads guilty, which plea is duly entered. The defendant waives time for Sentence, and no legal cause appearing why Judgment should not now be imposed, the Court renders Judgment as follows:

That the said defendant having been duly convicted of the crime charged in the Indictment herein, to-wit: unlawfully sell, etc., and possess said narcotic drugs, to-wit: morphine, committed on December 19, 1925, and on January 14, 1926, in violation of the Act of December 17, 1914, as amended, the Court now finds said defendant guilty thereof and does,

ORDER, ADJUDGE AND DECREE that as a punishment therefor on the first count he shall be imprisoned in the United States Penitentiary at Leaven-

worth, Kansas, for the term of fifteen (15) months, to date from the day of his arrival at said penitentiary.

And on the second count that he be imprisoned in the aforesaid penitentiary at Leavenworth, Kansas, for the term of fifteen (15) months, to run concurrently with the term of imprisonment imposed on the first count.

The defendant is remanded to custody of the Marshal for execution of the Judgment.

THE UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,)
District of Arizona) ss.
)

C-2619—(Phoenix)

THE PRESIDENT OF THE UNITED STATES OF
AMERICA

To the Marshal of the United States in and for the
said District of Arizona, and to the Warden of the
United States Penitentiary, Leavenworth, Kansas—
GREETING:

WHEREAS, at a Stated Term of the United
States District Court for the District of Arizona, on
the 1st day of February, 1926, an indictment was re-
turned by the Grand Jury of the United States for
said District of Arizona against

WILLIAM G. EHRLICH,

(Number C-2619—Phoenix) for the crime of unlaw-
fully and feloniously sell, etc., and possess narcotic
drugs (morphine), committed on Dec. 19, 1925, and
on Jan. 14, 1926, in violation of the Act of December
17, 1914, as amended.

AND WHEREAS, the said William G. Ehrlich
was on the 10th day of March, 1926, duly convicted in
said Court of said crime.

AND WHEREAS, pursuant to said conviction,
the Judgment and Sentence of said Court rendered
and imposed on the 10th day of March, 1926, was and
is that he be imprisoned in the United States Peni-

tentiary at Leavenworth, Kansas, on the first count for the term of Fifteen (15) months to date from the day of his arrival at said penitentiary; and on the second count, that he be imprisoned in the aforesaid penitentiary for the term of fifteen (15) months, to run concurrently with the term of imprisonment imposed on the first count.

As will fully and at large appear from the records and proceedings of said Court,

NOW, THEREFORE, in the name of the President of the United States of America, you, the said Warden of said Penitentiary, are hereby commanded to receive and safely keep and imprison the said William G. Ehrlich until said Judgment and Sentence be fully complied with, or until he be discharged therefrom by due process of law.

WITNESS, The Honorable F. C. Jacobs, Judge of said District, and my hand and the seal of said Court this 11th day of March, 1926.

C. R. McFALL,

Clerk.

By M. R. MALCOLM,

Deputy Clerk.

(Seal)

UNITED STATES MARSHAL'S RETURN

I received the within commitment Mar. 11, 1926, and executed the same on....., 192....., by delivering the body of within named..... to the Warden of the United States Penitentiary, Leavenworth, Kansas, as herein directed; and at the same time I handed to said Warden a duplicate original of the within Commitment.

Dated

.....
U. S. Marshal, District of Arizona.

By.....
Deputy.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)
) ss.
District of Arizona)

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of the Indictment, Minute Entries of Feb. 1, 1926, March 2nd, 1926, and March 10th, 1926, and Commitment, in case No. C-2619—(Phoenix), United States of America vs. William G. Ehrlich, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court
this 2nd day of April, 1926.

C. R. McFALL,

Clerk.

By M. R. MALCOLM,

(Seal)

Deputy.

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SUPREME COURT OF THE UNITED STATES.

No. 299.—OCTOBER TERM, 1925.

The Early & Daniel Company, Appel- lants, vs. The United States.	}	Appeal from the Court of Claims.
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[May 3, 1926.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a suit against the United States for \$22,000, balance due for hay delivered. Appellant made a contract with the Government the 31st of July, 1917, by which it agreed to furnish, during the period beginning August 1, 1917, and ending September 30, 1917, such hay as might be required by the Government during July and the first half of August of 1917, not to exceed 6,000,000 pounds, at 97½ cents per 100 pounds, and such hay as might be required during the last half of August, and all of September, 1917, not exceeding 6,000,000 pounds, at 95 cents per 100 pounds, to be delivered f. o. b. cars at Newport News, Virginia, subject to call of the Government in lots not to exceed 1,000,000 pounds per lot. The Government made calls which the plaintiff filled as follows:

Call No. 1, 500,000 lbs. August 15, 1917.

Call No. 2, 1,050,000 lbs. August 20, 1917.

Call No. 3, 2,000,000 lbs. September 5, 1917.

Call No. 4, 4,450,000 lbs. September 12, 1917.

These calls were all filled without protest, though the later calls were for amounts greater than 1,000,000 lbs. When the final and fifth call was made for 4,000,000 pounds, the appellant objected that the call was for more pounds of hay than the contract allowed for any one call. That objection was not made until it was too late for the defendant to amend the call. The appellant's vice-president then wrote to the government officer in charge that the fifth call was not deemed by the plaintiff to be in accord with the contract, and that the plaintiff did not intend to fill it. Under the terms of the contract, appellant had until November 15th, being three months

from the date of the first call, to complete its deliveries. On November 19th, the Camp Quartermaster wired to the appellant, "Amount hay on hand will supply needs to December 4th. Require prompt delivery 4,000,000 pounds. Advise at once your action, otherwise must buy in open market." After further exchange of telegrams, plaintiff sent the following telegram to the Camp Quartermaster under date of November 21, 1917:

"We will start shipping hay immediately, and in case you need any before arrival will arrange to have Hiden loan us a supply. Want it distinctly understood that we are doing this under protest and are going to put the matter up to proper authorities in Washington; and if they rule in our favor, want settlement at fair market price for amount we overfill. Will you wire C. S. Ruttle, General Agent, D. B. C. & W. Railway, to furnish equipment immediately as we request for hay to ship to you? Answer."

The plaintiff delivered under protest the remaining 4,000,000 pounds of hay. Thereafter the plaintiff accepted without protest the sum of \$38,000 which was all that was due under the contract. The plaintiff then filed this claim for \$22,000 with the Acting Quartermaster General of the United States Army, with the Auditor for the War Department, with the Secretary of War, with the Comptroller of the Treasury, and with the Board of Contract Adjustment, all of whom in turn decided that the claim could not be paid.

The appellant had the option of delivering the remainder of the hay under the terms of the contract, or of not delivering it at all, if the contract had been broken. It chose to deliver. It made a protest but that was ignored by the officers of the Government, and when the Government tendered the contract price, it was accepted by the appellant and without protest. Under such circumstances there is no ground for implying a contract to pay more than the contract price. *New York & New Haven v. United States*, 251 U. S. 123, 127; *Nelson Company v. United States*, 261 U. S. 17, 23; *Willard Sutherland & Company v. United States*, 262 U. S. 489, 494; *Atwater & Company v. United States*, 262 U. S. 495, 498.

The judgment of the Court of Claims is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.